user name not listed 2900 Group Art Unit 3B 3B04 (703) 308 9405/108

PTO/SB/21 (09-04)
Approved for use through 07/31/2006. OMB 0651-0031
U.S. Patent and Trademark Office; U.S. DEPARTMENT OF COMMERCE

TRANSMITTAL FORM

(to be used for all correspondence after initial filing)

Total Number of Pages in This Submission

Application Number	09/726,953
Filing Date	November 29, 2000
First Named Inventor	Ricardo Guimaraes
Art Unit	3743
Examiner Name	Fadi H. Dahbour
Attorney Docket Number	155615-0018 (P009)

ENCLOSURES *(Check all that apply)*

- [x] Fee Transmittal Form
  - [ ] Fee Attached
- [ ] Amendment/Reply
  - [ ] After Final
  - [ ] Affidavits/declaration(s)
- [ ] Extension of Time Request
- [ ] Express Abandonment Request
- [ ] Information Disclosure Statement
- [ ] Certified Copy of Priority Document(s)
- [ ] Reply to Missing Parts/ Incomplete Application
  - [ ] Reply to Missing Parts under 37 CFR 1.52 or 1.53
- [ ] Drawing(s)
- [ ] Licensing-related Papers
- [ ] Petition
- [ ] Petition to Convert to a Provisional Application
- [ ] Power of Attorney, Revocation Change of Correspondence Address
- [ ] Terminal Disclaimer
- [ ] Request for Refund
- [ ] CD, Number of CD(s) _____
  - [ ] Landscape Table on CD
- [ ] After Allowance Communication to TC
- [x] Appeal Communication to Board of Appeals and Interferences
- [x] Appeal Communication to TC **(Appeal Notice, Brief, Reply Brief)**
- [ ] Proprietary Information
- [ ] Status Letter
- [x] Other Enclosure(s) (please Identify below):
  Return Postcard

Remarks

SIGNATURE OF APPLICANT, ATTORNEY, OR AGENT

Firm Name	Irell & Manella LLP		
Signature			
Printed name	Brian E. Jones		
Date	April 11, 2005	Reg. No.	51,855

CERTIFICATE OF TRANSMISSION/MAILING

I hereby certify that this correspondence is being facsimile transmitted to the USPTO or deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450 on the date shown below:

Signature			
Typed or printed name	Susan M. Langworthy	Date	April 11, 2005

PTO/SB/17 (12-04)
Approved for use through 07/31/2006. OMB 0651-0032
U.S. Patent and Trademark Office; U.S. DEPARTMENT OF COMMERCE

Effective on 12/08/2004.
Fees pursuant to the Consolidated Appropriations Act, 2005 (H.R. 4818).

FEE TRANSMITTAL
For FY 2005

☑ Applicant claims small entity status. See 37 CFR 1.27

TOTAL AMOUNT OF PAYMENT ($) 250.00

Complete if Known	
Application Number	09/726,953
Filing Date	November 29, 2000
First Named Inventor	Ricardo Guimaraes
Examiner Name	Fadi H. Dahbour
Art Unit	3743
Attorney Docket No.	155615-0018 (P009)

METHOD OF PAYMENT (check all that apply)

☐ Check ☐ Credit Card ☐ Money Order ☐ None ☐ Other (please identify): _____

☑ Deposit Account Deposit Account Number: 09-0946 Deposit Account Name: Irell & Manella LLP

For the above-identified deposit account, the Director is hereby authorized to: (check all that apply)

☑ Charge fee(s) indicated below ☐ Charge fee(s) indicated below, **except for the filing fee**

☑ Charge any additional fee(s) or underpayments of fee(s) under 37 CFR 1.16 and 1.17 ☑ Credit any overpayments

WARNING: Information on this form may become public. Credit card information should not be included on this form. Provide credit card information and authorization on PTO-2038.

FEE CALCULATION

1. BASIC FILING, SEARCH, AND EXAMINATION FEES

	FILING FEES		SEARCH FEES		EXAMINATION FEES		
		Small Entity		Small Entity		Small Entity	
Application Type	Fee ($)	Fee ($)	Fee ($)	Fee ($)	Fee ($)	Fee ($)	Fees Paid ($)
Utility	300	150	500	250	200	100	
Design	200	100	100	50	130	65	
Plant	200	100	300	150	160	80	
Reissue	300	150	500	250	600	300	
Provisional	200	100	0	0	0	0	

2. EXCESS CLAIM FEES

Fee Description	Fee ($)	Small Entity Fee ($)
Each claim over 20 or, for Reissues, each claim over 20 and more than in the original patent	50	25
Each independent claim over 3 or, for Reissues, each independent claim more than in the original patent	200	100
Multiple dependent claims	360	180

Total Claims	Extra Claims	Fee ($)	Fee Paid ($)	Multiple Dependent Claims Fee ($)	Multiple Dependent Claims Fee Paid ($)
_____ - 20 or HP =	_____ x	_____ =	_____	_____	_____
HP = highest number of total claims paid for, if greater than 20					
Indep. Claims	**Extra Claims**	**Fee ($)**	**Fee Paid ($)**		
_____ - 3 or HP =	_____ x	_____ =	_____		
HP = highest number of independent claims paid for, if greater than 3					

3. APPLICATION SIZE FEE

If the specification and drawings exceed 100 sheets of paper, the application size fee due is $250 ($125 for small entity) for each additional 50 sheets or fraction thereof. See 35 U.S.C. 41(a)(1)(G) and 37 CFR 1.16(s).

Total Sheets	Extra Sheets	Number of each additional 50 or fraction thereof	Fee ($)	Fee Paid ($)
_____ - 100 =	_____ / 50 =	_____ (round up to a whole number) x	_____ =	_____

4. OTHER FEE(S)

	Fees Paid ($)
Non-English Specification, $130 fee (no small entity discount)	
Other: Appeal Brief Filing	250.00

SUBMITTED BY

Signature		Registration No. (Attorney/Agent) 51,855	Telephone 949-760-0991
Name (Print/Type)	Brian E. Jones		Date April 11, 2005

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of:	
Ricardo Guimaraes	Examiner: Fadi H. Dahbour
Application No.: 09/726,953	Art Group: 3743
Filed: November 29, 2000	
For: **LASIK LAMINAR FLOW SYSTEM**	

APPEAL BRIEF

Mail Stop Appeal Brief - Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

Appellant submits this Appeal Brief in triplicate pursuant to 37 C.F.R. § 1.192 for consideration by the Board of Patent Appeals and Interferences.

Please charge Deposit Account 09-0946 a fee in the amount of $250.00 as required by 37 C.F.R. § 1.17(c) for a small entity.

I. REAL PARTY IN INTEREST

The real party in interest is the Assignee, Med-Logics, Inc.

II. RELATED APPEALS AND INTERFERENCES

There are no related appeals or interferences known to the Appellant, Appellant's legal representative, or Assignee which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

III. STATUS OF CLAIMS

Claims 1-14 are pending and remain rejected. The Appellant appeals the rejection of claims 1-14.

IV. STATUS OF AMENDMENTS

No Amendments have been filed after the Final Office Action dated November 15, 2004.

V. SUMMARY OF INVENTION

One of the aspects of the invention is directed to a system for use on a patient's cornea during an ophthalmic procedure, such as during a LASIK procedure.[1] One of the embodiments may include a patient support table for supporting a patient.[2] The system may also include a light source, such as an Eximer laser, that directs a beam of light onto a

---

[1] Application at 5:3-5.

[2] Application at 5:10-11; patient support 12, patient 14 of Figure 1.

patient's cornea.[3] The system may further include an airflow module that directs a flow of air across the patient's cornea to reduce the amount of contaminants that may enter the corneal region.[4] In operation, the airflow module is moved adjacent to the patient to create an air flow directly above the cornea in such a manner that does not dehydrate the cornea.[5]

VI. ISSUES

The issues presented by this appeal are:

- Whether claims 12-14 are anticipated under 35 U.S.C. § 102(e) by U.S. Patent No. 6,019,754 to Kawesch ("Kawesch").
- Whether claims 1-11 are unpatentable under 35 U.S.C. § 103 over Kawesch in view of U.S. Patent No. 6,251,101 issued to Glockler ("Glockler").

VII. GROUPING OF CLAIMS

Appellant contends that all claims of the present invention stand or fall together.

---

[3] Application at 5:14-18; light source 16, beam of light 18, cornea 20 of Figure 1.

[4] Application at 5:19-20; 6:19-7:3; airflow module 22, flow of air 24, cornea 20 of Figure 1.

[5] Application at 7:8-13; airflow module 22, patient 14, cornea 20 of Figure 1.

VIII. ARGUMENTS

A. Introduction

For a patent claim to be held invalid, each claim element must be found in the prior art. The claimed invention was rejected based on a reference and a combination of references that failed to meet all of the elements of the claims. As a result, the rejection should be reversed.

B. The Claims Were Improperly Rejected Based On A Reference (Kawesch) That Discloses The Exact Opposite of the Claimed Invention

In the Final Office Action, all of the claims were rejected at least in part in view of Kawesch. To show that a claim is invalid because of anticipation or obviousness, a reference or a combination of references must meet every limitation of the claim. See MPEP 2131 ("A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference."); MPEP 2143.03 ("To establish *prima facie* obviousness of a claimed invention, all the claim limitations must be taught or suggested by the prior art."). Although Kawesch was identified as disclosing one of the elements of the claims, a review of Kawesch shows that Kawesch actually discloses the exact opposite of the claims.

Independent claim 1, which is representative of the other independent claims 8 and 12 for purposes of this appeal, recites:

> A system used to perform an ophthalmic procedure on a cornea of a patient, comprising:
>
> a patient support that can support the patient;
>
> a light source that can direct a light beam onto the cornea of the patient; and,
>
> an air flow module that can direct a flow of air above the cornea of the patient from one side of the cornea to another side of the cornea, at a distance so that the cornea is not de-hydrated by the flow of air.

Kawesch was relied upon to meet the last element of claim 1. The reliance on Kawesch was misplaced.

In contrast to the last element of claim 1, the Abstract of Kawesch makes it clear that Kawesch discloses a system that is especially made to dehydrate the corneal flap:

> After the corneal flap is repositioned, **a flap drying apparatus** is used to **dry** the repositioned corneal flap by applying filtered, compressed air ... at an appropriate pressure to **draw the sterile solution away** from the corneal flap/inner corneal layer interface... The surgeon terminates the application of the filtered, compressed air when the gutter area is observed to be **substantially dry**. [6]

Despite this unambiguous disclosure in Kawesch, the Final Office Action states that Kawesch discloses "an air flow module (200 of Fig. 4) that can direct a flow of air above the cornea of the patient ... at a distance so that the cornea is not dehydrated by the flow of air." To support this statement, the Final Office Action points to valve 206 of Figure 4 and quotes "manually operated ... manipulated to direct ... flow of ... air over" in Col. 5:26-28. This cropped quotation hides the entire sentence, which makes clear that the cornea **is** dehydrated by the flow of air:

> Valve 206 is opened by a surgeon and is manipulated to direct a very low flow of filtered, compressed air over the repositioned corneal flap **in order to draw the fluid out of the cornea/flap interface.**[7]

Even though it is undeniable that when fluid is drawn out, the cornea/flap interface is dehydrated, Kawesch leaves no doubt about this by disclosing that "the limited flow rate and associated pressure are required to provide sufficient air flow **for convective drying**..."[8] In fact, a quick perusal of the rest of Kawesch confirms that the system in Kawesch is used for dehydration.

---

[6] Kawesch at Abstract (emphasis added).

[7] Kawesch at Col. 5:26-29 (emphasis added).

[8] Kawesch at Col. 5:33-35 (emphasis added).

And that is not all. In line with the written disclosure of Kawesch, Figure 4 clearly shows that the air flow from valve 206 would directly impinge, and thus dehydrate, the cornea:

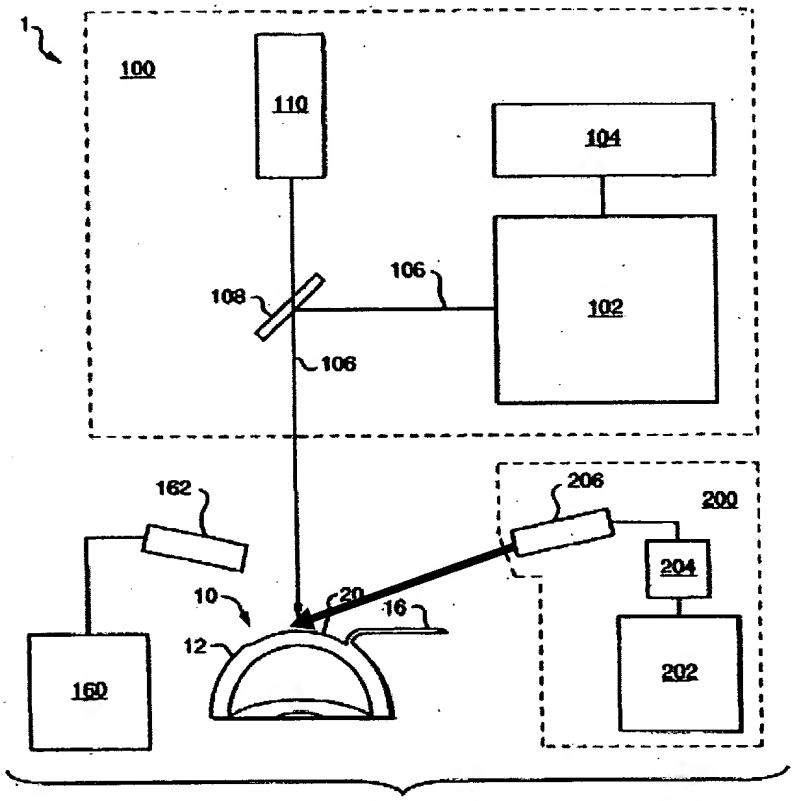

FIG. 4

Accordingly, it is readily apparent that the system disclosed in Kawesch does not disclose, teach, or suggest "an air flow module that can direct a flow of air above the cornea of the patient from one side of the cornea to another side of the cornea, at a distance so that the cornea is not de-hydrated by the flow of air" per claim 1. Consequently, the rejection of claims 1-14 should be reversed.

C. Conclusion

Contrary to the elements of independent claims 1, 8, and 12, Kawesch discloses a system for drying out a patient's cornea. As a result, the Final Office Action rejection of

these claims based on Kawesch was improper. Therefore, the rejections of claims 1, 8, and 12, as well as their corresponding dependent claims, should be reversed.

Respectfully submitted,

IRELL & MANELLA LLP

Dated: April 11, 2005

Brian E. Jones
Reg. No. 51,855

840 Newport Center Drive, Suite 400
Newport Beach, CA 92660
949-760-0991

Certificate of Mailing

I hereby certify that this correspondence is being deposited with the United States Postal Service as first class mail in an envelope addressed to: Mail Stop Appeal Brief – Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450 on April 11, 2005.

Susan Langworthy — April 11, 2005
Susan Langworthy Date

IX. APPENDIX

The claims on appeal are:

1. A system used to perform an ophthalmic procedure on a cornea of a patient, comprising:

a patient support that can support the patient;

a light source that can direct a light beam onto the cornea of the patient; and,

an air flow module that can direct a flow of air above the cornea of the patient from one side of the cornea to another side of the cornea, at a distance so that the cornea is not dehydrated by the flow of air.

2. The system of claim 1, further comprising a portable stand that supports said airflow module.

3. The system of claim 1, further comprising a control console that is coupled to said airflow module.

4. The system of claim 1, wherein said patient support includes a table.

5. The system of claim 1, wherein said light source includes a laser.

6. The system of claim 1, wherein said airflow module create a laminar flow of air.

7. The system of claim 1, wherein said airflow module includes an adjustable blade.

8. A system used to perform an ophthalmic procedure on a cornea of a patient, comprising:

a patient support that can support the patient;

a laser that can direct a light beam onto the cornea of the patient;

an air flow module that can direct a flow of air above the cornea of the patient from one side of the cornea to another side of the cornea, at a distance so that the cornea is not de-hydrated by the flow of air;

a portable stand that supports said air flow module; and,

a control console that is coupled to said airflow module.

9. The system of claim 8, wherein said patient support includes a table.

10. The system of claim 8, wherein said airflow module create a laminar flow of air.

11. The system of claim 8, wherein said airflow module includes an adjustable blade.

12. A method for performing an ophthalmic procedure on a cornea of a patient, comprising:

directing a flow of air above the cornea from one side of the cornea to another side of the cornea, at a distance so that the cornea is not de-hydrated by the flow of air;

creating a flap in the cornea;

moving the flap to expose a portion of the cornea;

ablating a portion of the exposed cornea with a laser beam; and,

moving the flap back onto the cornea.

13. The method of claim 12, further comprising adjusting a flowrate of the flow of air.

14. The method of claim 12, further comprising adjusting a direction of the flow of air.

OIPE JC124 APR 13 2005 PATENT & TRADEMARK OFFICE

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of:

Ricardo Guimaraes

Application No.: 09/726,953

Filed: November 29, 2000

For: **LASIK LAMINAR FLOW SYSTEM**

Examiner: Fadi H. Dahbour

Art Group: 3743

APPEAL BRIEF

Mail Stop Appeal Brief - Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

Appellant submits this Appeal Brief in triplicate pursuant to 37 C.F.R. § 1.192 for consideration by the Board of Patent Appeals and Interferences.

Please charge Deposit Account 09-0946 a fee in the amount of $250.00 as required by 37 C.F.R. § 1.17(c) for a small entity.

I. REAL PARTY IN INTEREST

The real party in interest is the Assignee, Med-Logics, Inc.

II. RELATED APPEALS AND INTERFERENCES

There are no related appeals or interferences known to the Appellant, Appellant's legal representative, or Assignee which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

III. STATUS OF CLAIMS

Claims 1-14 are pending and remain rejected. The Appellant appeals the rejection of claims 1-14.

IV. STATUS OF AMENDMENTS

No Amendments have been filed after the Final Office Action dated November 15, 2004.

V. SUMMARY OF INVENTION

One of the aspects of the invention is directed to a system for use on a patient's cornea during an ophthalmic procedure, such as during a LASIK procedure.[1] One of the embodiments may include a patient support table for supporting a patient.[2] The system may also include a light source, such as an Eximer laser, that directs a beam of light onto a

---

[1] Application at 5:3-5.

[2] Application at 5:10-11; patient support 12, patient 14 of Figure 1.

patient's cornea.[3] The system may further include an airflow module that directs a flow of air across the patient's cornea to reduce the amount of contaminants that may enter the corneal region.[4] In operation, the airflow module is moved adjacent to the patient to create an air flow directly above the cornea in such a manner that does not dehydrate the cornea.[5]

VI. ISSUES

The issues presented by this appeal are:

- Whether claims 12-14 are anticipated under 35 U.S.C. § 102(e) by U.S. Patent No. 6,019,754 to Kawesch ("Kawesch").
- Whether claims 1-11 are unpatentable under 35 U.S.C. § 103 over Kawesch in view of U.S. Patent No. 6,251,101 issued to Glockler ("Glockler").

VII. GROUPING OF CLAIMS

Appellant contends that all claims of the present invention stand or fall together.

---

[3] Application at 5:14-18; light source 16, beam of light 18, cornea 20 of Figure 1.

[4] Application at 5:19-20; 6:19-7:3; airflow module 22, flow of air 24, cornea 20 of Figure 1.

[5] Application at 7:8-13; airflow module 22, patient 14, cornea 20 of Figure 1.

VIII. ARGUMENTS

A. Introduction

For a patent claim to be held invalid, each claim element must be found in the prior art. The claimed invention was rejected based on a reference and a combination of references that failed to meet all of the elements of the claims. As a result, the rejection should be reversed.

B. The Claims Were Improperly Rejected Based On A Reference (Kawesch) That Discloses The Exact Opposite of the Claimed Invention

In the Final Office Action, all of the claims were rejected at least in part in view of Kawesch. To show that a claim is invalid because of anticipation or obviousness, a reference or a combination of references must meet every limitation of the claim. See MPEP 2131 ("A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference."); MPEP 2143.03 ("To establish *prima facie* obviousness of a claimed invention, all the claim limitations must be taught or suggested by the prior art."). Although Kawesch was identified as disclosing one of the elements of the claims, a review of Kawesch shows that Kawesch actually discloses the exact opposite of the claims.

Independent claim 1, which is representative of the other independent claims 8 and 12 for purposes of this appeal, recites:

> A system used to perform an ophthalmic procedure on a cornea of a patient, comprising:
>
> a patient support that can support the patient;
>
> a light source that can direct a light beam onto the cornea of the patient; and,
>
> an air flow module that can direct a flow of air above the cornea of the patient from one side of the cornea to another side of the cornea, at a distance so that the cornea is not de-hydrated by the flow of air.

Kawesch was relied upon to meet the last element of claim 1. The reliance on Kawesch was misplaced.

In contrast to the last element of claim 1, the Abstract of Kawesch makes it clear that Kawesch discloses a system that is especially made to dehydrate the corneal flap:

> After the corneal flap is repositioned, **a flap drying apparatus** is used to **dry** the repositioned corneal flap by applying filtered, compressed air ... at an appropriate pressure to **draw the sterile solution away** from the corneal flap/inner corneal layer interface... The surgeon terminates the application of the filtered, compressed air when the gutter area is observed to be **substantially dry**. [6]

Despite this unambiguous disclosure in Kawesch, the Final Office Action states that Kawesch discloses "an air flow module (200 of Fig. 4) that can direct a flow of air above the cornea of the patient ... at a distance so that the cornea is not dehydrated by the flow of air." To support this statement, the Final Office Action points to valve 206 of Figure 4 and quotes "manually operated ... manipulated to direct ... flow of ... air over" in Col. 5:26-28. This cropped quotation hides the entire sentence, which makes clear that the cornea **is** dehydrated by the flow of air:

> Valve 206 is opened by a surgeon and is manipulated to direct a very low flow of filtered, compressed air over the repositioned corneal flap **in order to draw the fluid out of the cornea/flap interface.**[7]

Even though it is undeniable that when fluid is drawn out, the cornea/flap interface is dehydrated, Kawesch leaves no doubt about this by disclosing that "the limited flow rate and associated pressure are required to provide sufficient air flow **for convective drying**..."[8] In fact, a quick perusal of the rest of Kawesch confirms that the system in Kawesch is used for dehydration.

---

[6] Kawesch at Abstract (emphasis added).

[7] Kawesch at Col. 5:26-29 (emphasis added).

[8] Kawesch at Col. 5:33-35 (emphasis added).

And that is not all. In line with the written disclosure of Kawesch, Figure 4 clearly shows that the air flow from valve 206 would directly impinge, and thus dehydrate, the cornea:

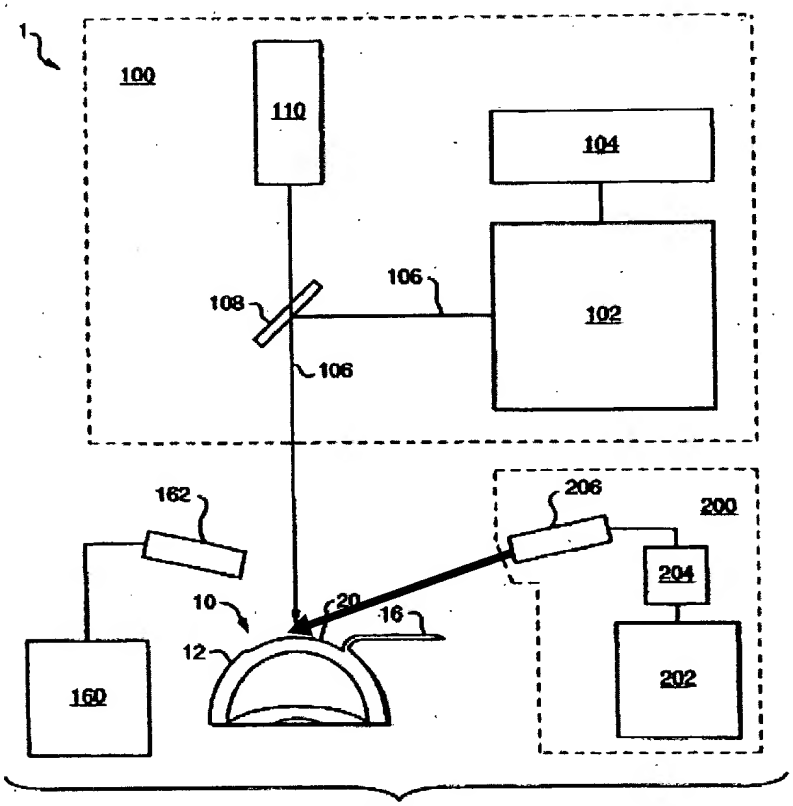

FIG. 4

Accordingly, it is readily apparent that the system disclosed in Kawesch does not disclose, teach, or suggest "an air flow module that can direct a flow of air above the cornea of the patient from one side of the cornea to another side of the cornea, at a distance so that the cornea is not de-hydrated by the flow of air" per claim 1. Consequently, the rejection of claims 1-14 should be reversed.

C. Conclusion

Contrary to the elements of independent claims 1, 8, and 12, Kawesch discloses a system for drying out a patient's cornea. As a result, the Final Office Action rejection of

these claims based on Kawesch was improper. Therefore, the rejections of claims 1, 8, and 12, as well as their corresponding dependent claims, should be reversed.

Respectfully submitted,

IRELL & MANELLA LLP

Dated: April 11, 2005

Brian E. Jones
Reg. No. 51,855

840 Newport Center Drive, Suite 400
Newport Beach, CA 92660
949-760-0991

Certificate of Mailing

I hereby certify that this correspondence is being deposited with the United States Postal Service as first class mail in an envelope addressed to: Mail Stop Appeal Brief – Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450 on April 11, 2005.

Susan Langworthy — Date: April 11, 2005

IX. APPENDIX

The claims on appeal are:

1. A system used to perform an ophthalmic procedure on a cornea of a patient, comprising:

a patient support that can support the patient;

a light source that can direct a light beam onto the cornea of the patient; and,

an air flow module that can direct a flow of air above the cornea of the patient from one side of the cornea to another side of the cornea, at a distance so that the cornea is not dehydrated by the flow of air.

2. The system of claim 1, further comprising a portable stand that supports said airflow module.

3. The system of claim 1, further comprising a control console that is coupled to said airflow module.

4. The system of claim 1, wherein said patient support includes a table.

5. The system of claim 1, wherein said light source includes a laser.

6. The system of claim 1, wherein said airflow module create a laminar flow of air.

7. The system of claim 1, wherein said airflow module includes an adjustable blade.

8. A system used to perform an ophthalmic procedure on a cornea of a patient, comprising:

a patient support that can support the patient;

a laser that can direct a light beam onto the cornea of the patient;

an air flow module that can direct a flow of air above the cornea of the patient from one side of the cornea to another side of the cornea, at a distance so that the cornea is not de-hydrated by the flow of air;

a portable stand that supports said air flow module; and,

a control console that is coupled to said airflow module.

9. The system of claim 8, wherein said patient support includes a table.

10. The system of claim 8, wherein said airflow module create a laminar flow of air.

11. The system of claim 8, wherein said airflow module includes an adjustable blade.

12. A method for performing an ophthalmic procedure on a cornea of a patient, comprising:

directing a flow of air above the cornea from one side of the cornea to another side of the cornea, at a distance so that the cornea is not de-hydrated by the flow of air;

creating a flap in the cornea;

moving the flap to expose a portion of the cornea;

ablating a portion of the exposed cornea with a laser beam; and,

moving the flap back onto the cornea.

13. The method of claim 12, further comprising adjusting a flowrate of the flow of air.

14. The method of claim 12, further comprising adjusting a direction of the flow of air.

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of:

Ricardo Guimaraes

Application No.: 09/726,953

Filed: November 29, 2000

For: **LASIK LAMINAR FLOW SYSTEM**

Examiner: Fadi H. Dahbour

Art Group: 3743

APPEAL BRIEF

Mail Stop Appeal Brief - Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

Appellant submits this Appeal Brief in triplicate pursuant to 37 C.F.R. § 1.192 for consideration by the Board of Patent Appeals and Interferences.

Please charge Deposit Account 09-0946 a fee in the amount of $250.00 as required by 37 C.F.R. § 1.17(c) for a small entity.

I. REAL PARTY IN INTEREST

The real party in interest is the Assignee, Med-Logics, Inc.

II. RELATED APPEALS AND INTERFERENCES

There are no related appeals or interferences known to the Appellant, Appellant's legal representative, or Assignee which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

III. STATUS OF CLAIMS

Claims 1-14 are pending and remain rejected. The Appellant appeals the rejection of claims 1-14.

IV. STATUS OF AMENDMENTS

No Amendments have been filed after the Final Office Action dated November 15, 2004.

V. SUMMARY OF INVENTION

One of the aspects of the invention is directed to a system for use on a patient's cornea during an ophthalmic procedure, such as during a LASIK procedure.[1] One of the embodiments may include a patient support table for supporting a patient.[2] The system may also include a light source, such as an Eximer laser, that directs a beam of light onto a

---

[1] Application at 5:3-5.

[2] Application at 5:10-11; patient support 12, patient 14 of Figure 1.

patient's cornea.[3] The system may further include an airflow module that directs a flow of air across the patient's cornea to reduce the amount of contaminants that may enter the corneal region.[4] In operation, the airflow module is moved adjacent to the patient to create an air flow directly above the cornea in such a manner that does not dehydrate the cornea.[5]

VI. ISSUES

The issues presented by this appeal are:

- Whether claims 12-14 are anticipated under 35 U.S.C. § 102(e) by U.S. Patent No. 6,019,754 to Kawesch ("Kawesch").

- Whether claims 1-11 are unpatentable under 35 U.S.C. § 103 over Kawesch in view of U.S. Patent No. 6,251,101 issued to Glockler ("Glockler").

VII. GROUPING OF CLAIMS

Appellant contends that all claims of the present invention stand or fall together.

---

[3] Application at 5:14-18; light source 16, beam of light 18, cornea 20 of Figure 1.

[4] Application at 5:19-20; 6:19-7:3; airflow module 22, flow of air 24, cornea 20 of Figure 1.

[5] Application at 7:8-13; airflow module 22, patient 14, cornea 20 of Figure 1.

VIII. ARGUMENTS

A. Introduction

For a patent claim to be held invalid, each claim element must be found in the prior art. The claimed invention was rejected based on a reference and a combination of references that failed to meet all of the elements of the claims. As a result, the rejection should be reversed.

B. The Claims Were Improperly Rejected Based On A Reference (Kawesch) That Discloses The Exact Opposite of the Claimed Invention

In the Final Office Action, all of the claims were rejected at least in part in view of Kawesch. To show that a claim is invalid because of anticipation or obviousness, a reference or a combination of references must meet every limitation of the claim. See MPEP 2131 ("A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference."); MPEP 2143.03 ("To establish *prima facie* obviousness of a claimed invention, all the claim limitations must be taught or suggested by the prior art."). Although Kawesch was identified as disclosing one of the elements of the claims, a review of Kawesch shows that Kawesch actually discloses the exact opposite of the claims.

Independent claim 1, which is representative of the other independent claims 8 and 12 for purposes of this appeal, recites:

> A system used to perform an ophthalmic procedure on a cornea of a patient, comprising:
>
> a patient support that can support the patient;
>
> a light source that can direct a light beam onto the cornea of the patient; and,
>
> an air flow module that can direct a flow of air above the cornea of the patient from one side of the cornea to another side of the cornea, at a distance so that the cornea is not de-hydrated by the flow of air.

Kawesch was relied upon to meet the last element of claim 1. The reliance on Kawesch was misplaced.

In contrast to the last element of claim 1, the Abstract of Kawesch makes it clear that Kawesch discloses a system that is especially made to dehydrate the corneal flap:

> After the corneal flap is repositioned, **a flap drying apparatus** is used to **dry** the repositioned corneal flap by applying filtered, compressed air ... at an appropriate pressure to **draw the sterile solution away** from the corneal flap/inner corneal layer interface... The surgeon terminates the application of the filtered, compressed air when the gutter area is observed to be **substantially dry**. [6]

Despite this unambiguous disclosure in Kawesch, the Final Office Action states that Kawesch discloses "an air flow module (200 of Fig. 4) that can direct a flow of air above the cornea of the patient ... at a distance so that the cornea is not dehydrated by the flow of air." To support this statement, the Final Office Action points to valve 206 of Figure 4 and quotes "manually operated ... manipulated to direct ... flow of ... air over" in Col. 5:26-28. This cropped quotation hides the entire sentence, which makes clear that the cornea **is** dehydrated by the flow of air:

> Valve 206 is opened by a surgeon and is manipulated to direct a very low flow of filtered, compressed air over the repositioned corneal flap **in order to draw the fluid out of the cornea/flap interface.**[7]

Even though it is undeniable that when fluid is drawn out, the cornea/flap interface is dehydrated, Kawesch leaves no doubt about this by disclosing that "the limited flow rate and associated pressure are required to provide sufficient air flow **for convective drying**..."[8] In fact, a quick perusal of the rest of Kawesch confirms that the system in Kawesch is used for dehydration.

---

[6] Kawesch at Abstract (emphasis added).

[7] Kawesch at Col. 5:26-29 (emphasis added).

[8] Kawesch at Col. 5:33-35 (emphasis added).

And that is not all. In line with the written disclosure of Kawesch, Figure 4 clearly shows that the air flow from valve 206 would directly impinge, and thus dehydrate, the cornea:

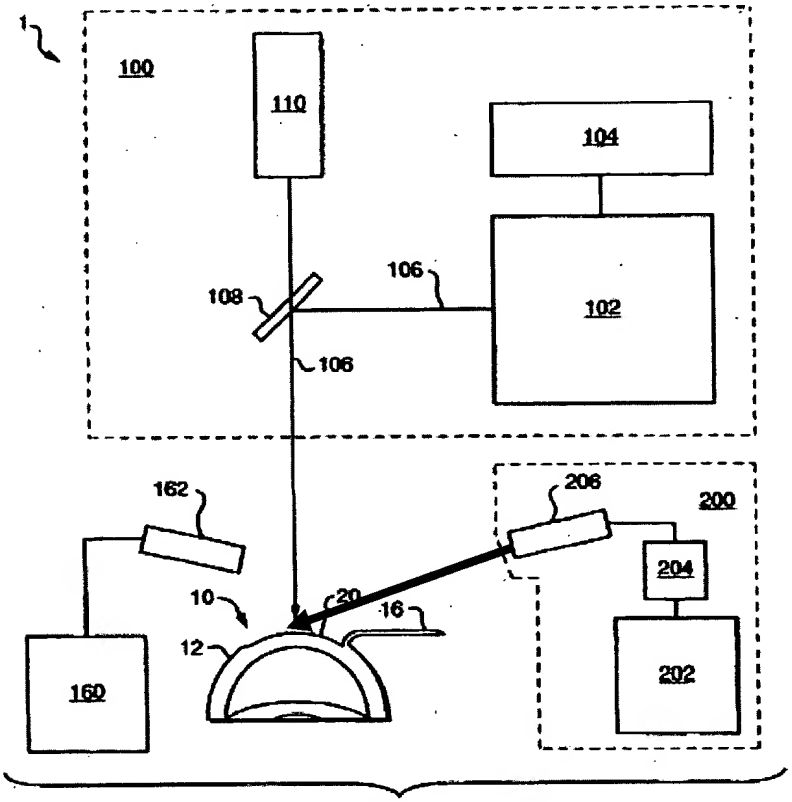

FIG. 4

Accordingly, it is readily apparent that the system disclosed in Kawesch does not disclose, teach, or suggest "an air flow module that can direct a flow of air above the cornea of the patient from one side of the cornea to another side of the cornea, at a distance so that the cornea is not de-hydrated by the flow of air" per claim 1. Consequently, the rejection of claims 1-14 should be reversed.

C. Conclusion

Contrary to the elements of independent claims 1, 8, and 12, Kawesch discloses a system for drying out a patient's cornea. As a result, the Final Office Action rejection of

these claims based on Kawesch was improper. Therefore, the rejections of claims 1, 8, and 12, as well as their corresponding dependent claims, should be reversed.

Respectfully submitted,

IRELL & MANELLA LLP

Dated: April 11, 2005

Brian E. Jones
Reg. No. 51,855

840 Newport Center Drive, Suite 400
Newport Beach, CA 92660
949-760-0991

Certificate of Mailing

I hereby certify that this correspondence is being deposited with the United States Postal Service as first class mail in an envelope addressed to: Mail Stop Appeal Brief – Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450 on April 11, 2005.

Susan Langworthy — Date: April 11, 2005

IX. APPENDIX

The claims on appeal are:

1. A system used to perform an ophthalmic procedure on a cornea of a patient, comprising:

a patient support that can support the patient;

a light source that can direct a light beam onto the cornea of the patient; and,

an air flow module that can direct a flow of air above the cornea of the patient from one side of the cornea to another side of the cornea, at a distance so that the cornea is not dehydrated by the flow of air.

2. The system of claim 1, further comprising a portable stand that supports said airflow module.

3. The system of claim 1, further comprising a control console that is coupled to said airflow module.

4. The system of claim 1, wherein said patient support includes a table.

5. The system of claim 1, wherein said light source includes a laser.

6. The system of claim 1, wherein said airflow module create a laminar flow of air.

7. The system of claim 1, wherein said airflow module includes an adjustable blade.

8. A system used to perform an ophthalmic procedure on a cornea of a patient, comprising:

a patient support that can support the patient;

a laser that can direct a light beam onto the cornea of the patient;

an air flow module that can direct a flow of air above the cornea of the patient from one side of the cornea to another side of the cornea, at a distance so that the cornea is not de-hydrated by the flow of air;

a portable stand that supports said air flow module; and,

a control console that is coupled to said airflow module.

9. The system of claim 8, wherein said patient support includes a table.

10. The system of claim 8, wherein said airflow module create a laminar flow of air.

11. The system of claim 8, wherein said airflow module includes an adjustable blade.

12. A method for performing an ophthalmic procedure on a cornea of a patient, comprising:

directing a flow of air above the cornea from one side of the cornea to another side of the cornea, at a distance so that the cornea is not de-hydrated by the flow of air;

creating a flap in the cornea;

moving the flap to expose a portion of the cornea;

ablating a portion of the exposed cornea with a laser beam; and,

moving the flap back onto the cornea.

13. The method of claim 12, further comprising adjusting a flowrate of the flow of air.

14. The method of claim 12, further comprising adjusting a direction of the flow of air.